No. 97-962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Supreme Court, U.S.
FILED
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CLERK

SOLID WASTE TRANSFER & RECYCLING, INC.,
Petitioner,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COUNTY OF ESSEX, THE CITY OF NEWARK, NEW JERSEY, THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF RATEPAYER ADVOCATE AND WASTE MANAGEMENT OF NEW JERSEY,
Respondents.

On Petition for a Writ of Certiorari To The Superior Court of New Jersey, Appellate Division

BRIEF OF RESPONDENT NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Does a state utility regulatory agency, consistent with the requirements of the Fifth and Fourteenth Amendments, have the right to reject an automatic rate escalator clause based on the Consumer Price Index (CPI) contained in a contract for solid waste disposal services where the solid waste utility fails to present evidence demonstrating the reasonableness of linking changes in solid waste disposal costs to changes in the CPI and also fails to present adequate cost of service data necessary to establish an alternative rate?

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COUNTERSTATEMENT OF THE CASE

The instant petition challenges an opinion of the Superior Court of New Jersey, Appellate Division, dated April 10, 1997 (Pa2)[1] in which the court addressed appellate challenges to a solid waste rate order issued by the New Jersey Department of Environmental Protection (Department). In its ruling, the court below affirmed in its entirety, the Department's order modifying Petitioner Solid Waste Transfer and Recycling's (SWTR) contract with the County of Essex (County) pursuant to which SWTR constructed and operated a solid waste transfer station for the County. Petitioner filed a petition for certification with the New Jersey Supreme Court which was denied on September 8, 1997.

The rate proceeding at issue began on July 16, 1987 before the New Jersey Board of Public Utilities (the agency vested with authority over solid waste utility operations prior to the transfer of such authority to the Department in 1991), with the County's application seeking issuance of a Certificate of Public Convenience and Necessity for operation of two solid waste transfer stations. In addition, the County sought Board approval of contracts it had entered into with two companies for the construction and operation of the solid waste transfer stations, Waste Management of New Jersey (WM) and Petitioner SWTR. The County further sought expedited interim approval of its application in light of a solid waste disposal crisis brought about by a court imposed August 1, 1987 deadline by which the County was to cease use of

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[1] "Pa" refers to the Appendix filed by SWTR with its Petition for Writ of Certiorari.

"DEPa" refers to the Appendix filed by the Department in the appellate proceeding below.

landfills located in the Hackensack Meadowlands District (Pa4 to Pa6).

In response to the County's emergent request, the Board, after hearing and by order dated July 31, 1987, approved initial, interim, emergent rates, subject to refund, for each of the two transfer station facilities (Pa6 to Pa7). The interim rates were $110.15 per ton for Type 10 municipal waste and $107.85 per ton for Types 13 (bulky), 23 (vegetative), and 27 (dry industrial) waste (Pa111). The case then proceeded to full hearings to determine the reasonableness of the contract rates.

During the course of the Board's rate investigation, the County supplemented its rate petition, seeking to include in rates CPI-based increases called for under the terms of its transfer station contracts (Pa43 to Pa44). With respect to SWTR, the CPI increases were 5.36 percent effective August 1, 1988 and 5.6 percent effective August 1, 1989 (Pa44). By order dated January 4,1989 (Pa43 to Pa44), however, the Board reaffirmed the interim nature of its initial rate approval and barred implementation of any CPI-linked rate increases pending final rate determination.

On February 10, 1989 a further Board order was issued by which the Board addressed a dispute arising over the applicable standard of proof. In that order the Board rejected sole application of a "competitive market" standard and directed that the case go forward before the assigned Administrative Law Judge (ALJ) on both a "competitive market" and a more traditional "cost of service" analysis (Pa46).

On December 26, 1990 the ALJ issued her Initial Decision (Pa58) in which she recommended approval of the transfer station operating contracts, including the CPI-based

escalator clauses.[2] The ALJ reasoned that the contracts were the result of "arms-length negotiations in a competitive market" and should be accepted by the Board (Pa146 to Pa168). The ALJ went on to state that, in view of her finding of a competitive market, it was not necessary to test the reasonableness of the proposed rates by more traditional rate making standards (Aa169, Aa192).

On August 8, 1991 the Board rejected the ALJ's Initial decision (Pa40). The Board found that: (1) SWTR had not met its burden of proof (Pa51); (2) the ALJ had failed to test the contract rates by way of a cost of service analysis in addition to the competitive market theory as the Board had directed (Pa46); and (3) a truly competitive market did not exist at the time of the County's negotiations with SWTR (Pa47 to Pa49). The Board further held that there had been no demonstration by SWTR that a CPI-linked automatic escalator clause reasonably reflected increases in costs associated with operation of a solid waste facility (Pa49 to Pa52). Finding no support for a CPI-based increase in rates above the interim level approved by the Board on an emergent basis, the interim rates, without CPI-based increases, were made the final rates (Pa56).

Following issuance of the Board's order, motions for reconsideration were filed. During the pendency of these motions, the Department succeeded to the solid waste regulatory authority formerly vested in the Board. After extensive briefing, oral arguments, and conferences, the Department rendered its final decision on reconsideration on August 23, 1994 (Pa26).

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[2] This was contrary to Board Staff's recommendation to the ALJ that SWTR's rates be *reduced* by $10.72 per ton and that refunds with interest be made to customers (DEPa69).

In its August 1994 decision, the Department adopted the ALJ's view that a competitive market existed at the time the County negotiated its transfer station contracts. However, the Department did not view this fact as detracting from its responsibility to review the resulting contract rate for reasonableness. With specific reference to the CPI-based rate escalator, the Department stated its unequivocal agreement with the Board's earlier rejection of such clause absent a showing of a correlation between CPI cost components and costs associated with transfer station operation (Pa33). Consequently, the interim rates which the Board had set became SWTR's final rates.

On appeal to the Superior Court of New Jersey, Appellate Division, SWTR challenged the Department's order on a number of bases, the major ones being: (1) the Department's refusal to accept a competitive market analysis as sole support of the reasonableness of SWTR's contract rate; and (2) the Department's requirement that SWTR demonstrate a relationship between cost components of the CPI and costs associated with transfer station operations. On April 10, 1997, the Superior Court, Appellate Division issued its ruling affirming the Department's rate determination in its entirety.

On the issue of the rejection of SWTR's automatic CPI-based escalator clause, the Court, stated:

> SWTR knew or should have known from the outset in 1987 that [it was a public utility] and would function and be treated as such.
>
> * * *
>
> It is patently clear that the Board, and also the [Department] when it succeeded to the regulatory powers of the Board, had the authority to eliminate the applicability of the CPI-based automatic escalator

> clause of each contract. Each contract was subject to modification in the exercise of the overriding authority of the Board to act in the public interest.
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> [Pa19 to Pa20]

Quoting from *In re Application of Saddle River*, 71 *N.J.* 14, 362 *A.*2d 552 (1976), the Court further emphasized that even municipal solid waste contracts arrived at by means of competitive public bidding are nevertheless subject to modification in the public interest (Pa18 to Pa19). Finally, the Court noted that both transfer station operating contracts:

> contained language which required them to be construed in accordance with and be governed by the laws of this State and we are satisfied that both contracts were entered into subject to the acceptance and approval of the Board. A specific clause to that latter effect is contained in the SWTR contract.
>
> [Pa19]

Rejecting SWTR's objections to the Department's requirement that a "nexus" be shown between CPI cost components and those commonly associated with transfer station operations, the Court remarked:

> A meaningful 'nexus' or connection must exist between the underlying cost factors (food, household goods, and electronic equipment) built into the CPI and the underlying cost factors (labor, transportation, depreciation, landfill and disposal costs) built into transfer station operation . . . so that the resultant rate after applying the CPI factor can be deemed just and reasonable.
>
> [Pa21]

Moreover, the fact that the CPI-based escalator clause was contained in a contract negotiated at arm's length in a competitive marketplace, was not viewed by the Court as compelling the ratemaking agency below to accept it at face value:

> While the County agreed that its taxpaying community would bear the added costs of CPI-based rate increases applied at the rate of 106% to the existing rate structure of each contract, it could not abrogate the Board's statutory responsibility to review and modify public utility contracts to insure a just and reasonable rate or charge.
>
> [Pa22]

Nor did the Court find that requiring a "nexus" between CPI cost components and transfer station costs was the announcement of a previously unknown "policy" requiring agency rulemaking, as argued by SWTR. Instead, the Court found that requiring that a "nexus" be shown was "merely another way of defining the burden, incumbent upon public utilities seeking an increase in rates to prove that proposed rates are just and reasonable" (Pa21). In addition, the Court stated that, contrary to assertions by SWTR, the Department's rejection of the contractual CPI-based adjustments was not "retroactive" since the CPI clauses "had never been finally accepted" by the State and the State retained its authority to modify solid waste contract rates "without exception" (Pa21).

Following issuance of the Court's opinion, a Notice of Petition for Certification was filed by SWTR with the Supreme Court of New Jersey on April 29, 1997. As previously stated, that petition was denied on September 8, 1997.

ARGUMENT

THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY PROPERLY APPLIED WELL-ESTABLISHED PRINCIPLES OF UTILITY RATE MAKING IN DETERMINING THAT THE STATE DEPARTMENT OF ENVIRONMENTAL PROTECTION CORRECTLY REJECTED PETITIONER'S PROPOSED SOLID WASTE UTILITY RATES FOR FAILURE TO PRESENT EVIDENCE SUPPORTING THE REASONABLENESS OF SUCH RATES AND NO SUBSTANTIAL CONSTITUTIONAL QUESTION THEREFORE EXISTS WARRANTING THE GRANT OF CERTIORARI BY THIS COURT.

Petitioner principally claims that the appellate court below failed to give consideration to the constitutional arguments raised in its challenge to the rate determination of the New Jersey Department of Environmental Protection. In attempting to support this contention, however, Petitioner has done little more than demonstrate a general dissatisfaction with the result reached by the Department and the reviewing court. Notwithstanding Petitioner's claims of confiscatory rates and retroactive impairment of contractual rights, the fact remains that it was Petitioner's own failure to present the data necessary to support the reasonableness of its proposed CPI-based rate adjustments which led to the rejection of such adjustments, rather than any constitutional infirmity in the legal analysis of the rate making agency or the reviewing court below.

While Petitioner cites *Duquesne Light Co. v. Barasch*, 488 *U.S.* 299 (1989) as support for the proposition that a rate

is too low if it is so "unjust" as to "practically deprive the owner of the property without due process of law" (Petition at p. 8), Petitioner fails to recognize that in *Duquesne* the Court also acknowledged that a state "does not 'take' property simply because it disallows recovery of capital investments that are not 'used and useful in the service to the public.'" *Duquesne Light Co. v. Barasch*, 488 *U.S.* at 301. By the same token, a state does not "take" property simply because it disallows proposed rate increases which have not been adequately supported by the utility as reasonable.

With respect to SWTR's contention that its contractual rights were unconstitutionally impaired by the State's disallowance of the CPI-linked automatic adjustment clause, this Court long ago recognized that rates set by contract between regulated entities and private parties are subject to the overriding jurisdiction of the State. In *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 *U.S.* 372 (1919), this Court rejected arguments by the Union Dry Goods Company that a rate order issued by the Railroad Commission of Georgia deprived it of lower electric rates than those negotiated as part of an earlier private contract. In dismissing such argument and upholding the State's overriding authority to alter the contract rates, this Court stated, in language particularly applicable to the present circumstances, that

> except for the seriousness with which this claim has been asserted and is now pursued into this court, the law with respect to it would be regarded as so settled as not to merit further discussion. That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict has been often decided by this court.

[248 U.S. at 275]

This Court went on to cite a long line of similar and even earlier rulings on this issue, saying:

> These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state.
>
> [*Id.* at 377]

It is a rudimentary principle of utility rate making that the burden is on a utility seeking approval of its rates to demonstrate by sufficient competent evidence the reasonableness of its proposal. *New Jersey Bell Telephone Co. v. Bd. of Public Utility Comm'rs*, 12 *N.J.* 568, 97 *A.*2d 602 (1954); *In re New Jersey Power and Light Co.*, 9 *N.J.* 498, 89 *A.*2d 26 (1952). Indeed, *N.J.S.A.* 48:2-21(d) specifically states that "[t]he burden of proof to show that the increase, change or alteration [in rates] is just and reasonable shall be upon the public utility making same. . . ."

In the present instance the burden was squarely upon SWTR to demonstrate the reasonableness of its requested rate increase, including its proposed CPI-linked escalator clause, regardless of whether such clause was in a tariff or a contract. It was a deficiency in SWTR's proofs, and not any alleged improper action by the Department, that resulted in the denial of SWTR's rate request and the affirmance of that agency decision by the court below.

In its Petition, SWTR restates its major objections to the rate determination of the Department, all of which were properly rejected by the reviewing court and none of which

rises to the level of an issue of public importance warranting this Court's review. SWTR's alleged "constitutional issues" are addressed below.

Rejection of Automatic CPI-linked escalator clause

SWTR contends that it was improper for the Department to reject the automatic CPI-linked escalator clause in its contract with Essex County because: (1) the clause was part of a contract arrived at by way of arms-length negotiations; (2) other contracts approved by the Department allegedly contain similar clauses; (3) the requirement of a "nexus" between components of the CPI and costs associated with transfer station operation was the articulation of a new policy; and (4) even with the application of the automatic escalator, rates at SWTR's facility would still be low in comparison with other facilities.

In light of this Court's own pronouncements acknowledging the sovereign authority of a State to override contract rates when necessary to protect the public interest, the Appellate Division properly affirmed the Department's rejection of an automatic CPI-linked escalator clause absent proof as to reasonableness.

The fact that escalator clauses may have been approved by regulators in other instances was found by the court below to be unpersuasive since "[e]ach case must rest upon its own peculiar facts." *Id.* Indeed, the escalator clauses referenced by SWTR had either been specifically tailored to reflect the cost components of each operation under review and made subject to periodic updates -- safeguards not part of SWTR's proposal

-- or were part of out-of-state contracts not subject to the Department's jurisdiction[3] (Pa34).

Similarly, the fact that SWTR's rates would or would not have been lower than those at other facilities, even with application of a CPI escalator, is not indicative of the *per se* reasonableness of such clause. The fact that a rate may be lower than that at another facility does not reflect the reasonableness of the profit, or "rate of return" realized by a facility's operator, unless there is also a comparison of the operating expenses at each facility. SWTR did not present a full record of its own operating expenses, let alone those of any other facility, choosing instead to rely solely on the alleged competitive nature of its contract negotiations.

Finally, SWTR's interpretation of the requirement of a "nexus" between the cost components of the CPI and the costs of operating a solid waste transfer station as a new policy is without merit. As the agencies and the reviewing court below found, the requirement that SWTR demonstrate a reasonable correlation between changes in the price of consumer goods and changes in costs associated with a solid waste transfer station operation, is no more than a requirement that SWTR meet its statutory burden of proving the reasonableness of its proposed rates.

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[3] For example, in *In re SES Gloucester*, BPU Docket No. SE 85100984 (October 21, 1987, Pa216), the formula used was based upon the Producer Price Index, not the CPI, and each adjustment was made subject to further review. In *In the Matter of the Petition of Union County*, DEP Docket No. CT05503003 (January 14, 1994, Pa214), the adjustment clause at issue was contained in an out-of-state contract not subject to Department jurisdiction. A contract between a New Jersey solid waste utility (Pen Pac) and an out-of-state contractor (Chambers) was also the case in *In the Matter of the Application of Passaic County Utilities Authority* (BPU Docket No. S08704360 (October 26, 1987, Pa218).

Finally, it is most disingenuous for Petitioners to rely on *Permian Basin Area Rate Cases*, 390 *U.S.* 747, reh. den. 392 *U.S.* 917 (1968) for the proposition that the Department unconstitutionally severed the CPI-linked rate adjustment clause from SWTR's contract with the County. While the Court in *Permian Basin* refers to arguments raised by gas producers in reliance upon an earlier Federal Power Commission (FPC) decision, specifically *Pure Oil Co.*, 25 *F.P.C.* 383, wherein the FPC refused to declare unenforceable certain contractual adjustment clauses, the Court, in fact, upheld a contrary decision of the FPC in *Permian Basin*. The *Permian Basin* Court clearly stated that although the Natural Gas Act is "premised upon . . . private contracting . . . the Commission has plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interest." 390 *U.S.* at 784. Thus, *Permian Basin* supports, rather than detracts from, the validity of the rate determination below.

Alleged Failure on the Part of the Department to Set an Alternative Rate for SWTR Once CPI-Linked Escalator Clause Was Rejected

As previously noted, the burden of proving the reasonableness of a proposed rate is always upon the utility seeking the ratemaker's approval thereof. See *N.J.S.A.* 48:2-21(d). Indeed, where a utility has received rate approval despite its failure to present adequate supporting evidence, reviewing courts have not hesitated to reverse the ratemaker's decision. Thus, in *Public Service Coordinated Transport v. State*, 5 *N.J.* 196, 74 *A.*2d 580 (1950), an order of the then Board of Public Utility Commissioners authorizing a bus fare increase despite the utility's failure to present competent evidence of reasonableness, was rejected.

In the hope of obscuring this basic principle, however, SWTR attempts to shift its burden to the Department by creating an obligation on the part of the Department, once the CPI clause was rejected, to set an "alternative" rate for SWTR. What SWTR conveniently ignores, however, is that, by adopting SWTR's interim rate as the final approved rate, the Department set an alternative rate, albeit one not to SWTR's liking, but one which, in the expert opinion of the rate making agency, was the only rate supported by the record SWTR chose to create.

Even were the burden of proof not so unequivocally SWTR's, it would be fundamentally unfair to require the limited staff and resources of a regulatory agency to be applied towards making a case for a rate applicant who chooses to stand on a limited record. As is evident from the record herein, SWTR chose to present its competitively bid contract at face value and not present the data necessary for the agency to construct a cost of service case, despite notice in the Board's February 10, 1989 order that the case was to proceed under both a cost of service and competitive market analysis. Because SWTR would not, or could not, present evidence justifying its contract rate and automatic CPI adjustment clause in a traditional cost of service manner, the record was left with significant gaps. For example, in attempting to justify an alternative cost-based rate for SWTR, Department Staff had to work with SWTR's unaudited annual reports, financial statements that co-mingled landfilling expenses and subcontracted transportation costs, undelineated expenses attributable to certain contractual arrangements, and listings of salary expenses without delineation of corresponding duties (DEPa41 to DEPa70).

After grappling with these deficiencies in the record created by SWTR, Staff computed a rate significantly lower

than the interim rate ultimately adopted by the Department as the final rate for SWTR (Pa52 to 56). That the Department did not reduce SWTR's interim rate and order refunds as recommended by agency Staff can only be described as generous, in view of the limited nature of the data available from SWTR.[4]

Simply put, SWTR's theory that the burden is upon the ratemaker to create a record establishing an alternative rate for a utility that chooses to limit its proofs to a single rate making theory, is without support in statute or case law.

Alleged Unredressed Financial Risks Assumed by SWTR

SWTR contends that it assumed financial risks when it entered into the contract with Essex County which, absent application of the CPI or an "alternative" rate, will remain unredressed. As the Court below found, however, SWTR is a public utility and every public utility service contract is deemed entered into with knowledge of the sovereign power of the State to alter it (Pa18). Unlike a private vendor who can seek to maximize profits, a regulated entity is limited to a fair rate of return based upon proof as to the reasonableness of its rates. *Id.* While SWTR has obviously realized less profit than it would have liked, the fact remains that the

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[4] For SWTR to now argue that the agencies below accepted its operating expenses as reasonable (Petition at p.11) ignores the difficulty the State had in establishing such operating expenses in the first instance. The acceptance of SWTR's operating expenses merely supports the finding by the State that SWTR's interim rates, which reflected those expenses, should be made permanent. It has no bearing upon the reasonableness of the automatic CPI escalator. Nor does it explain SWTR's failure to prove the appropriateness of using escalations in consumer price index components to track increases in solid waste transfer station costs.

record it created did not support a higher charge for the services it rendered. Moreover, the Court below correctly observed that SWTR did not claim that its overall financial health has been jeopardized, only that it has not reaped the full extent of what it mistakenly thought was its bargain with the County (Pa24). To the extent that SWTR now attempts to portray itself as being in more severe financial distress, it is attempting to supplement the record and relitigate its rate case, an inappropriate use of a writ for certiorari.

In conclusion, Petitioners have presented no meritorious constitutional challenge to the decision entered below. The Department and the reviewing court based their determinations on the record created by SWTR. The fact that such record failed to support SWTR's proposed CPI based rates or any rates in excess of those set at interim levels, is SWTR's fault and not the result of any constitutional infirmity in the analysis of the Court below.

CONCLUSION

Petitioners set forth no important or special reasons for this Court to consider. For the foregoing reasons their Petition for a Writ of Certiorari should be denied.

Dated this 9th day of January, 1998.

Respectfully submitted,

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